UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

ERIC NEIBAUER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-341-P-H***
	)	
SHIMANO AMERICAN	***)***	
CORPORATION, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The defendants, Shimano American Corporation and Shimano, Inc., move for summary judgment in this products liability action arising out of an injury suffered by the plaintiff in a bicycling accident. The defendants contend that the testimony of the plaintiff's identified expert witness is inadmissible, that the warnings they gave with the product at issue were sufficient as a matter of law, and that the plaintiff cannot produce evidence of a design defect sufficient to allow that claim to go to the jury. I recommend that the court deny the motion.

I. Summary Judgment Standard

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The following undisputed material facts are appropriately supported in the summary judgment record.

On July 24, 1996 the plaintiff, while practicing "wheelies"[1] on his mountain bicycle in a parking lot before a race, overbalanced and fell backward and to the right, falling off the bicycle, Deposition of Eric Neibauer ("Plaintiff's Dep."), copy of transcript attached to Defendants' Motion for Summary Judgment or Partial Summary Judgment, etc. ("Motion") (Docket No. 8) as Exh. D, at 70-74, and fracturing his right ankle, Deposition of John J. Padavano, D. O. ("Padavano Dep."), copy of transcript attached to Motion as Exh. I, at 12.

The plaintiff had owned the bicycle he was riding at the time of the accident since 1994. Plaintiff's Dep. at 17. He began to participate in organized mountain bicycle races in 1995. *Id*. at 14. In early 1996 the plaintiff purchased and installed on his bicycle clipless[2] Shimano pedals. *Id*. at 34-35. He had used another brand of clipless pedals before this. *Id*. He probably read the literature that came with the Shimano pedals. *Id*. at 101-02. The pedals that the plaintiff used were Shimano model 535 which had single-release mode cleats. Answer No. 6, Plaintiff's Answers to Defendant Shimano American's Interrogatories ("Answers to Interrogatories") (copy attached to Motion as Exh. C); Plaintiff's Dep. at 49. Shimano clipless pedals are also available with multiple-release mode cleats. Shimano Service Instructions (copy attached to Motion as Exh. B) at [1]. Single-release mode clipless pedals are released by twisting the rider's heel to the outside; multiple-release mode pedals are released by moving the heel in any direction. Deposition of Daniel D.

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[1] A "wheelie" involves pulling the front wheel of a bicycle up off the ground while the rider balances on the rear wheel. Plaintiff's Dep. at 72-73.

[2] Clipless bicycle pedals are equipped with a retainer on the pedal that fits a cam on the cyclist's shoe. The cyclist "clips in" to each pedal, which remains attached to the sole of the shoe until the cyclist moves his heel in a specified direction, thereby disengaging the attachment. R. Reese, "Pedalmania!," *Biking* (February 1995), at 21 (attached to Motion as Exh. A). The benefits of clipless pedals include more control, more confidence, better power transfer, getting power on the upstroke, extra propulsion and a competitive advantage. Plaintiff's Dep. at 35-36, 95.

Dearing ("Dearing Dep."), copy attached to Motion as Exh. F., at 123-24.

The plaintiff did not know about the difference between single-release and multiple-release cleats when he purchased the model 535 clipless pedals. Plaintiff's Dep. at 48. While the literature that accompanied the model 535 clipless pedals warned that a fall could cause a severe injury, it did not inform the purchaser that multiple-release mode cleats were safer than single-release mode cleats. Shimano Service Instructions at [1]-[2]. Before the accident, the plaintiff had practiced with the Shimano 535 clipless pedals, had taken spills while using them, and felt confident with them. Plaintiff's Dep. at 38, 49-50, 69.

The plaintiff's designated expert witness, Daniel D. Dearing, is a teacher and a coach, but not a bicycling coach. Dearing Dep. at 3. He first used clipless pedals in 1988 or 1989. *Id*. at 62-63. He began using them on his off-road bicycles when they first became available for that type of bicycle, in 1991 or 1992. *Id*. at 63. He used Shimano model 737 single-release mode clipless pedals. Affidavit of Daniel D. Dearing ("Dearing Aff."), attached to Plaintiff's Opposing Statement of Facts ("Plaintiff's SMF") (Docket No. 11) as Exh. 2, ¶ 6. He worked as a bicycle mechanic from 1984 until 1998. Dearing Dep. at 7, 14, 34. He sometimes tested new bicycle equipment. *Id*. at 30-31. He has installed hundreds of clipless pedals, including "probably four dozen" Shimano model 535 clipless pedals. Dearing Aff. ¶ 3. He has ridden on approximately 100 bicycles equipped with model 535 clipless pedals and eight to ten times on bicycles equipped with multiple-release mode cleats. *Id*. ¶¶ 5, 7.

III. Discussion

A. Expert Testimony

As a threshold issue, the defendants contend that the proposed testimony of the plaintiff's

designated expert witness, Daniel D. Dearing, Ex. E to Motion, should be excluded in its entirety under *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Specifically, the defendants argue that Dearing lacks the necessary qualifications to give his proposed testimony, that his proposed testimony lacks reliability under *Daubert*, and that the factual basis for his opinions is unrelated to his conclusions.[3] Motion at 15.

While it is now clear that the trial judge's general "gatekeeping" function with respect to expert testimony that was set forth in *Daubert* applies to all expert testimony, not just that based on scientific knowledge, *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1171 (1999), it is also clear that the specific analytical factors listed in *Daubert* "neither necessarily nor exclusively appl[y] to all experts or in every case," *id*. Relevant reliability concerns may focus on personal knowledge or experience, not just scientific principles. *Id*. at 1175. "[T]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Id*. (quoting with approval from the brief for the United States as *Amicus Curiae*). "[W]hether *Daubert*'s specific factors are, or are not,

[3] The plaintiff contends that objections to the proposed testimony of his expert witness should only be made through a motion *in limine* and that the court may only rule on whether the testimony may be offered at trial or in connection with a motion for summary judgment after holding an evidentiary hearing. Plaintiff's Objection to the Defendants' Motion for Summary Judgment and Memorandum of Law ("Plaintiff's Objection") (Docket No. 10) at 4. While determination of such issues outside the context of a motion for summary judgment is often preferable, there is no requirement in the Federal Rules of Civil Procedure or this court's local rules that such a procedure be followed, nor was any such requirement imposed by the Scheduling Order (Docket No. 4) in this case. *Cf. Guiggey v. Bombardier*, 615 A.2d 1169, 1172 n.3 (Me. 1992) (question whether expert witness is qualified should not be decided in state court on motion for summary judgment). Neither party is entitled to a hearing on a *Daubert* motion as a matter of course. *E.g., Target Mkt. Publ'g, Inc. v. Advo, Inc*., 136 F.3d 1139, 1143 n.3 (7th Cir. 1998) (*in limine* hearings not required on every rejected proffer of expert testimony); *Lanni v. State of New Jersey*, 177 F.R.D. 295, 303 (D.N.J. 1998) (opponent of proposed expert testimony must demonstrate *prima facie* case of unreliability before evidentiary hearing required).

reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine." *Id*. at 1176.

The defendants' argument insists on applying the specific *Daubert* factors to Dearing, and that is the basic error in the defendants' approach. Dearing's proposed testimony does not purport to be based upon anything other than his own experience and the knowledge acquired along with that experience. It does not purport to offer scientific theory[4] or to be validated by test results. *See United States v. Nichols*, 169 F.3d 1255, 1265 (10th Cir. 1999) (*Daubert* factors not used to determine reliability of expert testimony based upon experience or training). The defendants contend Dearing may not be allowed to testify because he has no academic training in human factors engineering or product safety, has no experience in bicycle pedal design or accident reconstruction, and has not engaged in any research, formal testing or field study concerning clipless bicycle pedals. Motion at 15-18; Defendants' Reply Memorandum (Docket No. 14) at 2-6. Under the circumstances of this case, and particularly where the defendants essentially argue that Dearing should not be allowed to testify at all, rather than attacking each of his anticipated opinions as set forth in the plaintiff's expert witness designation, Plaintiff's Designation of Experts, copy attached as Exh. E to Motion at 1-2, none of those things is required in order to qualify Dearing to testify as an expert.[5] Most of the defendants' objections to Dearing's proposed testimony go to its weight, not to its admissibility. Such questions are reserved to the jury.

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[4] The fact that the subject matter of expert testimony is not "scientific" is no bar to its admissibility. *United States v. Kayne*, 90 F.3d 7, 11 (1st Cir. 1996).

[5] Under the circumstances, I intimate no opinion on Dearing's proposed testimony on any of the points included in the plaintiff's designation but not specifically addressed by the parties in connection with this motion.

The defendants' challenge to Dearing's proffered testimony concerning causation merits further brief discussion. The defendants contend that Dearing may not rely on the testimony of John J. Padavano, D.O., as support for his conclusion that the plaintiff's ankle was broken as a result of his inability to remove his shoe from the bicycle pedal because (i) Dr. Padavano's testimony concerning the motion causing the injury to the plaintiff's ankle cannot be equated with moving the heel of the shoe in an inward and upward manner, which was the motion tested by Dearing in a multiple-release mode cleat;[6] (ii) Dr. Padavano testified that he could not reconstruct the accident; (iii) Dr. Padavano could not testify as to what motion the plaintiff's foot went through to get out of the pedal or where the foot was relative to the pedal when the fracturing stopped; and (iv) there is no evidence concerning where the right pedal on the plaintiff's bicycle was relative to the bicycle at the time of the fracture. Defendants' Reply Memorandum at 3-4.

None of these challenges requires the exclusion of Dearing's testimony on causation. It is not possible to tell from Dr. Padavano's deposition testimony whether the movement of the ankle which he describes as causing the plaintiff's injury excludes the possibility of a movement of the plaintiff's heel inward and upward with respect to the bicycle pedal. His testimony could be compatible with such a movement. Padavano Dep. at 12-15, 20, 30-32. It is not necessary for Dr.

[6] The defendants contend that Dearing may not testify concerning the test he performed, moving the heel of a shoe connected to a multiple-release mode cleat to the inside and upward, because he "does not state that he performed the same test with a single release cleat, and therefore is incapable of offering any comparison." Defendants' Reply Memorandum at 3. Since there does not appear to be any dispute about the fact that the single-release mode cleats used by the plaintiff at the time of the accident were released "by twisting your heels to the outside," Shimano Service Instructions at [1], there is no need for Dearing to perform the test of moving the heel to the inside and upward in order to testify to a comparison. In any event, a comparison of the two pedals does not appear to be the point of Dearing's test. Rather, the test was undertaken to demonstrate that such a movement would result in a release of the multiple-release mode cleat.

Padavano to reconstruct the accident in order for either Dr. Padavano or Dearing to testify about causation. Neither the motion that the plaintiff's foot went through "to get out of the pedal" or where the foot was relative to the pedal "when the fracturing stopped," both of which happened after the injury had occurred, is necessary in order to show causation. Finally, the defendants make no showing concerning the relevance of the position of the right pedal relative to the bicycle at the time of the fracture; whatever that position was, the plaintiff's heel could still have moved upward and inward in relation to the pedal itself. Again, the defendants' objections go to the weight of Dearing's testimony on causation, not to its admissibility.

Dearing's proposed testimony is not inadmissible for any of the reasons asserted by the defendants and they accordingly are not entitled to summary judgment based on a lack of expert testimony.

B. Duty to Warn

The complaint does not allege a breach of a duty to warn as an independent ground for recovery. The complaint alleges the existence of a duty to warn as part of claims of strict product liability (Count I), Complaint (Docket No. 1) ¶ 22(b), and negligence (Count III), *id*. ¶27(c). The alleged actionable conduct consisted only of the failure to warn consumers that single-release mode cleats were "much less safe" or "significantly less safe" than multiple-release mode cleats. *Id*. The defendants seek summary judgment on these portions of Counts I and III on the grounds that there is no duty, as a matter of law, to warn consumers that a safer product exists and that the warnings provided with the model 535 pedals were sufficient as matter of law. Motion at 8-10. Since it is undisputed that the specific warning set forth in the complaint was not provided by the defendants, the two arguments are in fact variations on a single theme.

Under Maine law, a duty to warn arises when the manufacturer knew or should have known of a danger sufficiently serious to require a warning. *Pottle v. Up-Right, Inc.*, 628 A.2d 672, 675 (Me. 1993). Breach of the duty to warn is one way in which a manufacturer may violate 14 M.R.S.A. § 221,[7] Maine's strict liability statute, as well as a way to establish negligence. *Id*. at 674-75. Section 221 is based on section 402A of the Restatement (Second) of Torts, *Oceanside at Pine Point Condominium Owners Ass'n v. Peachtree Doors, Inc*., 659 A.2d 267, 269 n.3 (Me. 1995), and indeed repeats the language of that section of the Restatement (Second) almost verbatim. Restatement (Second) of Torts § 402A (1965). Section 402A had now been superceded by the Restatement (Third) of Torts: Products Liability, and specifically for purposes of the claim raised in this action by section 2 of the Restatement (Third), which provides, in relevant part:

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> * * *
>
> (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the

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[7] The statute provides:

> One who sells any goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume or be affected by the goods, or to his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of his product and the user or consumer has not bought the product from or entered into any contractual relation with the seller.

14 M.R.S.A. § 221.

product not reasonably safe.

Restatement (Third) of Torts: Products Liability § 2 (1998).

Contrary to the defendants' position, this is not a case in which the plaintiff asserts that the defendant had a duty to warn consumers that the product of another manufacturer, incorporated into its product, was unreasonably dangerous. *Bouchard v. American Orthodontics*, 661 A.2d 1143 (Me. 1995), upon which the defendants rely, Motion at 8, is accordingly inapposite. Indeed, the plaintiff's presentation of his claim appears to be a classic one within the Restatement definition: the foreseeable risks of harm posed by the single-release mode cleat could have been reduced or avoided by a warning from the defendants that multiple-release cleats were easier to separate from the rider's shoe. In addition, the question whether the hazards inherent in the single-release mode cleat were open and obvious in comparison to the multiple-release mode cleat is very much in dispute based on the summary judgment record.

I cannot conclude from the summary judgment record that the defendants had no duty to warn consumers in the manner specified by the complaint. When a duty to warn exists, the warning must advise the user of the risks and offer specific directions for the product's safe use. *Pottle*, 628 A.2d at 675. Here, while the defendants did offer some specific directions, they did not offer the information which Dearing will testify was required. The adequacy of the warnings provided by the defendants with the model 535 clipless pedals cannot be determined on this record as a matter of law. The third and final element of this claim, that the failure to provide a warning must be a substantial factor in bringing about the injury, *id.*, is addressed by the plaintiff's testimony that he would have purchased and installed multiple-release mode cleats if the warning Dearing deems necessary had been provided, Answers to Interrogatories, No. 18, and Dearing's testimony that the

plaintiff's shoe would have come out of the multiple-release mode cleats if his foot moved in an inside and upward direction during his fall, Dearing Aff. ¶ 9.

Accordingly, the defendants are not entitled to summary judgment on those claims in the complaint based on an alleged failure to warn.

C. Design Defect

The defendants contend that the plaintiff "has no admissible evidence to support" a claim that the model 535 clipless pedals are defective because they had single-release rather than multiple-release mode cleats. Motion at 19. While this portion of the motion for summary judgment appears to be based largely on the argument that Dearing's testimony is inadmissible, an argument that I have rejected, the defendants also argue that the plaintiff has provided no testimony or evidence concerning the "danger utility" test by which design defects are established under Maine law.

The "danger utility" test "weighs the utility of the product against the danger it presents," and requires proof that "involve[s] an examination of the utility of [the product's] design, the risk of the design and the feasibility of safer alternatives." *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283, 1285 (Me. 1988). Here, the feasibility of the purported safer alternative is established by the existence of a multiple-release mode cleat pedal manufactured by Shimano. The risk of the design is set forth both in the literature that accompanies the model 535 single-release mode cleat pedal, Shimano Service Instructions at [1], and in the testimony of the plaintiff and Dearing, *e.g.*, Plaintiff's Dep. at 96, 105; Dearing Dep. at 98, 119. The utility of the design is set forth in Exhibit A to the Motion and in the testimony of the plaintiff, Plaintiff's Dep. at 114, and that of Dearing, Dearing Dep. at 57-59, 99. While the plaintiff's formal designation of Dearing as an expert does not expressly state that he will testify concerning the "danger utility" test, the statement that he will

testify that the single-release mode cleat pedals were unreasonably dangerous and defective, Plaintiff's Designation of Experts at 1-2, necessarily includes testimony concerning the tests that provide the elements of proof of such a claim. Viewing the record in the light most favorable to the plaintiff, I cannot say that there is an absence of evidence to support the plaintiff's claim of a design defect. It is not the role of the court to evaluate the weight of that evidence in connection with a motion for summary judgment.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **DENIED.**

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 28th day of June, 1999.

David M. Cohen
United States Magistrate Judge